UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

D. R. HORTON, INC.	)	
and	)	**Case 12-CA-25764**
MICHAEL CUDA, an Individual	)	

RESPONDENT'S ANSWERING BRIEF TO BRIEF OF AMICI SERVICE EMPLOYEES INTERNATIONAL UNION, TAYLOR BAYER AND ALTON SANDERS

D.R. Horton, Inc. ("Respondent" or "Company"), files this answering brief to the brief of Amici Curiae Service Employees International Union ("SEIU"), Taylor Bayer, and Alton Sanders, in support of General Counsel's exceptions to the Decision of Administrative Law Judge William N. Cates. ALJ Cates refused to find that the Company violated Section 8(a)(1) of the Act by maintaining and enforcing its Mutual Arbitration Agreement, under which employees are required, as a condition of employment, to agree to submit all individual employment disputes to arbitration, waiving rights to a judicial forum, where the arbitration agreement further provides that arbitrators will have no authority to consolidate claims or to fashion a proceeding as a class or collective action.

I. The Company Reasserts Facts, Cases, and Authorities Already Presented

The Company has already treated at length with those portions of SEIU's arguments that mirror the position of the General Counsel in his brief in support of exceptions. See Respondent's Answering Brief to General Counsel's Exceptions, dated April 11, 2011. The Company has also filed a Supplemental Brief addressing the Supreme Court's decision in *AT&T*

Mobility LLC v. Concepcion, 563 U.S. __, 2011 WL 1561056 (2011), decided on April 27, 2011, subsequent to the filing of SEIU's brief. Accordingly, this Answering Brief will not repeat all facts and arguments previously made but will instead focus on discrete points raised in SEIU's brief.

II. The SEIU Mischaracterizes the Scope of the Mutual Arbitration Agreement

SEIU concedes, as it must, that the Company's Mutual Arbitration Agreement does not violate Section 7 of the Act insofar as it requires employees to arbitrate workplace-related claims rather than litigating such claims in a judicial forum (see Br. 1). However, because the agreement provides that arbitrators have no authority to consolidate claims or to fashion an arbitration proceeding as a class or collective action, SEIU argues that the agreement "prohibit[s] employees from acting in concert" (Br. 1) and therefore "violates core Section 7 rights" and Section 8(a)(1) of the Act. This argument lacks merit.

The arbitration agreement nowhere prohibits employees, expressly or otherwise, from joining together or otherwise conferring with each other to bring workplace claims against the Company in arbitration. For example, employees are completely unhampered by the agreement from deciding amongst themselves to each bring individual claims against the Company for the same alleged workplace wrongs that affect each of them. Indeed, the facts of this case establish that employees appear to have done precisely that by hiring the same attorney to bring alleged Fair Labor Standard Act claims for unpaid overtime on behalf of a number of similarly situated individuals. The Company could not and did not object to such collaboration. All that the agreement restricts, and all that the Company fought against in arbitration, is the procedural device of a class or collective action to resolve those claims, and that restriction is expressed, not as a limitation on the right of employees to confer and decide to bring claims *en masse* against the Company, but rather as a limitation on the power of the arbitrator to entertain and rule on a

class or collective basis. This is a far cry from a prohibition on employees "acting in concert" as SEIU posits.

The distinction between prohibiting class or collective actions as a procedural device and prohibiting collaboration or cooperation in fact is crucial to this case and a proper analysis of applicable legal precedents. Although the Board has certainly held on many occasions that bringing a class or collective action against an employer by employees is protected concerted activity under Section 7, and that employees cannot be discharged or otherwise retaliated against for bringing such a suit, this is not the same as guaranteeing that employees can always move forward with such a suit or that the employer is legally prohibited from objecting to the suit either because joinder of claims does not satisfy legal prerequisites or is barred by an independent agreement between the employer and its employees. In this way the right to maintain a class or collective action is not a core Section 7 substantive right; the right at issue, rather, is only the right to attempt such a suit without adverse impact on the employee's employment. No such adverse impact has occurred here, as we pointed out in our briefs already on file with the Board.

III. The SEIU's Attempts to Avoid Binding Supreme Court Precedent are Legally Baseless

Because it suits its theory to do so, SEIU seeks to divorce this case from the context in which it arose -- an agreement between employer and employee to arbitrate workplace disputes rather than litigate in court -- and to describe the issue as whether an employer can adopt a "workplace rule" prohibiting employees from filing a class or collective action (Br. 4). This characterization must fail. The ban against class or collective actions in this case is expressed as a limitation on the power of the arbitrator in an agreement to arbitrate, which carries numerous benefits for the employee as well as the employer. Notably, those benefits include all remedies

that would otherwise be available in court, speed and ease of resolution of disputes, and payment of the employee's attorney fees by the Company if the claim is found to be meritorious by the arbitrator. As noted, SEIU elsewhere concedes (Br. 5) that an agreement to divert litigation from court to private arbitration is valid and enforceable. Calling the agreement a "workplace rule" is simply a means by which SEIU seeks to avoid the effect of the Federal Arbitration Act ("FAA") and the decisions of the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991), *AT&T Mobility v. Conception*, 563 U.S. __, 2011 WL 1561956 (2011), and *Stolt-Nielsen S.A. v. Animal Feeds*, 559 U.S. __, 130 S. Ct. 1758 (2010), as well as the other court cases cited in our earlier briefs to the Board.

These decisions of the Supreme Court and other courts are hardly "entirely irrelevant" as SEIU contends (Br. 4). Although those cases did not arise under the NLRA or address the implications of Section 7 of the Act, they certainly do address the primacy of the FAA and the congressional purpose to put agreements to arbitrate on the same footing as other contracts. Moreover, as the Court stated in *Penn Plaza LLC v. Pyett*, 556 U.S. __, 129 S.Ct. 1456, 1465 (2009) (a case involving the SEIU where bargaining unit employees challenged a waiver of an individual right to bring ADEA claims that had been included in a collective bargaining agreement):

> Nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative. This Court has required only that an agreement to arbitrate statutory antidiscrimination claims be "explicitly stated" in the collective bargaining agreement.

Id.

Should the Board adopt SEIU's position that Section 7 of the NLRA precludes a class action waiver in an arbitration agreement, the Board will find itself at odds with the Supreme

Court and the body of other jurisprudence that has arisen on this issue under the FAA.[1] The Board can avoid this conflict by recognizing and holding to the boundaries set forth in FAA and related case law, and ruling that class action waivers in arbitration agreements are valid and enforceable and do not conflict with the right of employees under Section 7 of the NLRA to be free from discrimination or retaliation for engaging in concerted activity for their mutual aid and protection.

IV. The SEIU's Suggested Remedy Exceeds the Board's Authority

Consistent with its argument that Section 7 of the Act guarantees employees the right to maintain a class action against the Company because bringing a class action is supposedly a "core substantive right" under the statute, SEIU asks the Board to order the Company to "rescind its class action prohibition and to cease and desist from seeking to enforce that prohibition against any employee or group of employees" (Br. 6). This requested remedy is outside the Board's discretion to grant, for, as demonstrated, it runs afoul of the FAA. Compare *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002) (Board remedy that potentially trenches upon federal statutes and policies unrelated to the NLRA must yield and are outside Board's otherwise broad remedial discretion). Granting such a remedy would put employees in a more favored position than other litigants merely by virtue of their status as employees and would be tantamount to accepting SEIU's argument that employees are inherently victims of employer "wage theft" and incapable of acting in their own best interest. Such arguments are nothing more than unfounded hyperbole, are unsupported by any record evidence in this case, and cannot be permitted to carry the day.

[1] If the Board adopts the SEIU's extreme position, it would essentially layer every federal, state, and local employment statute with the alleged substantive right to pursue class or collective claims under the NLRA. This position is legally unfounded and raises significant constitutional issues as well.

V. Conclusion

For the reasons set forth herein and in the Company's other briefs on file in this case, the General Counsel's exceptions to the ALJ's decision should be found without merit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Respondent's Answering Brief to Brief of Amici Service Employees International Union and Taylor Bayer and Alton Sanders was served on July 18, 2011 by electronic mail on the following:

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